ANNIE YEO v. SENANAYAKE

[C. A. (Rose C.J., Buttrose and Chua JJ.) June 28, 1962]

[Singapore — Civil Appeal No. 6 of 1962]

Partnership — Fraudulent misrepresentation by majority partner inducing plaintiff to buy shares in partnership belonging to him — Whether plaintiff became partner — Partnership subsequently wound up — Recission — Restitio in integrum.

The plaintiff was a broker employed in a firm of brokers with a capital of $100,000, $51,000 of which was held by the defendant. On April 13 and 17, 1959, the defendant offered to sell 10 of his shares to the plaintiff at $40,000, and said to the plaintiff that the business was a gold mine and that she should not miss the opportunity of entering this flourishing business. In reliance of this representation, the plaintiff took up five shares at a cost of $20,000. The plaintiff then examined the firm's books in May and June and found that there was an overdraft of $250,000 at a bank and realised that she had made a bad investment. The plaintiff brought an action for money had and received. The learned judge dismissed her action on the ground that by taking the shares, she had become a partner and therefore there was no total failure of consideration. The plaintiff appealed.

Held: (1) there was fraudulent misrepresentation by the defendant upon which the plaintiff acted;

(2) although fraud was not pleaded, innocent misrepresentation was, and if the plaintiff proved something more, this did not put her in a worse position than she would have been in if she had only been able to establish innocent misrepresentation;

(3) the parties should therefore be restored to the same position that they were in before the plaintiff purchased the shares upon the false representation of the defendant.

COURT OF APPEAL.

Philip Hoalim Sr. for the appellant.

L. A. J. Smith for the respondent.

Rose C.J.: This is a curious case but, as we have made up our minds, we think it is unnecessary to delay the matter further by reserving judgment. It is one of those cases which require to be regarded with considerable caution. Any plaintiff who is a knowledgeable person who comes into court and says that he did something or bought something on the strength of a representation must, naturally, expect his case to be closely examined, because courts as a rule are somewhat chary of finding that a competent plaintiff, a professional dealer or something of that sort, relied in fact on a representation when he had his own knowledge and experience to guide him.

Well now, in this particular case the facts seem to us to justify the Judge in coming to the decision that he did with regard to them. First, one has to consider whether the representation was made — in the present case its materiality is not in question; secondly, whether that representation was false; and thirdly — this of course is usually the most difficult point for a plaintiff to overcome — whether the plaintiff in fact acted upon it.

Now, what are the facts in this case? The plaintiff apparently was what is called here in this country a remiser, that is, a broker, in a firm of brokers in which the defendant held the principal interest. It appears that at the inauguration of the firm he held $51,000 of the capital and the remaining $49,000 was held by another man, one Goh Teik Teong. Subsequently the $49,000 was subdivided between Goh and his two infant children.

The position, therefore, was that Mr. Senanayake was a majority partner — just a majority partner — in this firm. The plaintiff had been working in the same firm for some four years prior to the episode in question as a broker, but it is conceded that in her capacity as a remiser she would not have had access to the books of the firm as according to the position taken up by the defendant, which on that point is reasonable enough, the books were only available to the partners in the firm.

Well now, what is the evidence for the plaintiff? She says that on two days in April, 13th of April and 17th of April, representations were made to her in the presence of a witness, a Dr. Kiani (who testified on the plaintiff's behalf), about this matter and that she was offered by the defendant ten shares, ten of his shares — it is important to note that he is offering to sell his own personal shares — for $40,000; which, of course, is obviously a high price being four times the amount of their original valuation. She says — and that is common ground — that she took five shares at $20,000, being half the number she was offered.

Now of course it is very important to consider what the evidence is as to that transaction. The plaintiff says that she bought those shares because she thought that it was a profitable business. Now why did she think it was a profitable business? She thought it was a profitable business because the defendant said so; and the defendant, she says, was a rich man, an influential man, a good business man, and had been her employer for a number of years. She therefore accepted what he said. He told her that it was a gold mine. Well that of course means nothing more than that it was a profitable affair; that he trusted her; that she brought in good clients and so on; and that it would be a great mistake if she missed this golden opportunity of entering this flourishing business.

Then there was the discussion or, at any rate, the implication that on the purchase of these shares she would either at once or in due course — there was considerable argument about that — become a partner in the firm. The primary matter, however, was, according to her case that she invested $20,000 by buying Mr. Senanayake's own personal shares on the representation that this was a flourishing business; that it was a gold mine and that she must not miss the golden opportunity.

Well now, as I say, on the face of it, one must investigate that evidence very carefully because it is easy enough for a plaintiff if

he finds that he has made an unlucky speculation to come and say afterwards "I was told this, that and the other." In this case, what is the defendant's position? His position is not as I must say I rather expected it to be: "This is all nonsense; I mean it may be that I said that the business was a promising one but she knew far more about this than I do. She has been in the business for years. She knew all about it and therefore she did not rely on any representation of mine. In fact I did not make any."

But he does not say that. What he says is that he told her the whole story; that he told her in fact that her money would go straight to reduce the overdraft; and that the firm had had losses and all the rest of it. And he then says that she answered that she knew all about that; that she understood this; and that the position had been explained by the accountant Mr. Sivam; it was because of her being aware and having been made aware of these facts about the overdraft and the financial losses that she in fact reduced the amount of her investment from $40,000 to $20,000.

Now the learned Judge disbelieved all of that and I must say that, so far from having to go into the question of whether he was reasonable to disbelieve it, we are all of opinion that he would have been quite unreasonable to believe it. On the face of it for a business man to come and say in effect that talking with a business woman, having told her that his business is in a bad state, that it had had losses, and that her money — any money that she puts in — will go direct to the bank in reduction of the firm's overdraft, the effect upon the plaintiff was "Very well; instead of putting into the business the whole investment that I was intending, I will put in only half" does not make sense. A responsible man of the world who is prepared to swear to that is in my opinion prepared to swear to anything; and therefore one cannot quarrel with the learned Judge in disbelieving him on other matters of fact; and in the event the learned Judge disbelieved him *in toto*. He said that he found him to be an unsatisfactory witness and that he did not believe his evidence or the evidence of his accountant Sivam, who was called on his behalf.

We have therefore the position of an imprudent plaintiff and an untruthful defendant. Fraud of course was not pleaded in this case and learned counsel for the defendant makes a point of that. It is not customary in this sort of case to plead fraud and, as has been pointed out by Lord Halsbury in a case which was cited to us, the fact that while innocent misrepresentation only is pleaded the evidence proved something more does not put the plaintiff in any worse position than he would have been in if he had only been able to establish innocent misrepresentation.

In the present case there is no doubt that on the learned Judge's findings there was in fact fraudulent misrepresentation by the defendant; and upon that fraudulent misrepresentation the plaintiff acted and invested her money.

Well now, what is the position from that? There was considerable discussion as to whether or not she was technically a partner. The Judge found that she was; because he said she was treated as a partner, and he relies in particular upon one matter, that she had been told by the defendant that she could not see the books until she was a partner; and she did see the books. It was in fact only when she saw the books that she realised that a fraud had been perpetrated upon her and the learned Judge therefore found that as she could not have seen the books unless she was a partner, it would seem to be probable that she was a partner. We do not quarrel with that finding as although the Share Brokers Association may have raised difficulties — there was evidence to that effect — there is no evidence on the record as to what, if any, steps they could have taken. She was at the lowest a *de facto* partner and it was from that position that she saw the books.

These conversations took place on the 13th and the 17th of April. The plaintiff looked at these books in May and in June and she took definite action, in the sense that a solicitor's letter was written on her behalf, on the 1st of July, that is, just over two months after her money was paid on the 20th April.

In so far as any question of delay is concerned we do not think the plaintiff can in any way be criticised for that. There is no unreasonable delay. Her money is paid in on the 20th April; she looks at the books in May and June; and also there is something else which happened in June that is of importance. The position was that there was an overdraft of some $250,000 at the bank. Nobody suggests that the bank was pressing for its reduction — there was no suggestion of that — but the evidence is that the defendant was worried about it and had told the other partners that he was tired of the position and was not prepared to continue to guarantee it unless the partners put up some more money to assist in its reduction.

We therefore have the position of a man, within two months of his having informed the plaintiff that the business was a gold mine and she must not miss this opportunity of buying his shares — be it remembered at four times their nominal value — adopting the attitude that he was not prepared any further to guarantee this substantial overdraft unless his partners assumed some of the burden.

It is not difficult to believe that the plaintiff, when confronted with this attitude of the defendant, realised that she had been unwise in the matter and had in fact made a thoroughly bad investment.

The learned Judge found in favour of the plaintiff on the facts in all these matters but came to the conclusion that her action must fail on the ground that there was no total failure of consideration.

Now, what was it that the plaintiff thought she was actually getting and what did she in fact get? Primarily the transaction was between the plaintiff and the defendant personally, on representations made not by the other partners at all, not by the partnership as such, but by Mr. Senanayake the individual, in order to sell his personal shares. It was thus a matter between these two people. The plaintiff thought — on the strength of the defendant's representations — that she was getting for her $20,000 five thousand dollars (nominal) worth of shares (i.e. five shares) in a profitable and lucrative concern. What she in fact got was an investment in a firm which had a large overdraft at the bank which the defendant himself was not prepared to carry any longer and a number of substantial commitments.

It is unnecessary to refer to the precise details as the learned Judge has done that; but it is clear that instead of investing her money in a thoroughly good business she had been misled into investing in a thoroughly bad one.

The subsequent history of the firm is, perhaps, not material. There may be explanations for what occurred but the fact remains that this gold mine of a business was shortly afterwards wound up. In the result the plaintiff found herself in possession of five shares, for which she had paid $20,000, which were to all intents and purposes worthless.

Up to this point it would seem that the plaintiff had no difficulty in her way but learned counsel for the defendant contends that her action must fail because in fact she has had the benefit of some consideration, in that she was made a partner.

Let us now consider whether in fact this so called consideration was of any substance at all. What did the plaintiff becoming a partner really entail? The learned trial Judge sets it out in his judgment. She regarded herself as a partner; she was introduced to the staff as a partner by the defendant; she attended partners' meetings; she acted as managing partner when Mr. Goh Teik Teong went on leave; she inspected the books and thereby clearly exceeded the rights of a mere assignee of a partner's share; and that is all. That is what she actually got from her partnership in this business. For that short period of time, until she decided wisely enough to resile from the firm, she had the pleasure — the arid, naked honour — of being able to say: "I am a partner in this brokers' firm." A partner in a firm that is overdrawn to an extent which the senior partner himself was not prepared to sustain and that had substantial commitments.

Well now, is that really a bar to the plaintiff succeeding? Can one really say to a woman who buys relatively worthless shares at a very high price, and who in addition has the arid satisfaction for a few weeks of calling herself a partner and being able to look at the partnership books which supplied her with the evidence of how valueless that partnership really was, can you really say to that woman: "You have had something for your money."?

There was a great deal of discussion in the lower court as to whether the plaintiff should be entitled to amend her claim to one of rescission. Her application was ultimately refused and the case proceeded on the basis of money had and received. There is a passage in Lord Halsbury's book which was referred to in the judgment. It is unnecessary to refer to it again here except to say that it would seem that in a case where money is paid by a representee to a representor and nothing has happened in the meantime to make it impossible or even unreasonably difficult to restore the parties to their original position, an action for money had and received lies on exactly the same basis as an action would lie for rescission.

We were referred by learned counsel for the defendant to Mr. Snell's little book on Equity which is often useful in that it sets out briefly the effect of the authorities. In the 25th Edition at page 569, I think it was, it is stated that a person who rescinds his contract is entitled to be restored to the position he would have been in had the contract not been made; and his property must be returned and so on. No damages are recoverable since the purpose of damages is to place the party recovering them in the same position, so far as money can do it, as he would have been in had the contract been carried out. It stands to reason in the present case that there would have been great difficulty in assessing what the damages would be. If you begin to assess the damages in a case where a person thinks he has got a good investment and finds that he has a bad one, the assessment must be a very hit and miss affair. It seems to me in the circumstances of this case that in view of the shortness of time which elapsed between the purchase of the shares and the resiling from the transaction, the appropriate remedy is for the parties to be restored to the same position that they were in before the plaintiff purchased the shares upon the false representation of the defendant.

On this view of the position, the plaintiff is entitled to the return of her $20,000 the transaction in effect being regarded as a nullity.

For these reasons the appeal must be allowed and judgment entered for the plaintiff for $20,000 and costs, here and below.

Buttrose and **Chua JJ.** concurred.

Appeal allowed

Solicitors: *Philip Hoalim & Co.; L. A. J. Smith.*